

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF NATURAL RESOURCES

David H. Kaldahl, Five Lake
(56-357-P), Otter Tail County,
Building of an Unauthorized
Excavated Channel and Removal
of Unauthorized Fill Below
the Ordinary High Water Mark
of Five Lake

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDED ORDER

By written Motion received by the Office of Administrative Hearings on July 28, 1986, David Kaldahl sought an Order of the Administrative Law Judge dismissing the above-captioned matter for lack of jurisdiction in the Commissioner of Natural Resources to regulate construction in or alteration of Five Lake. By Order dated October 9, 1986, the Administrative Law Judge dismissed the Motion and found that the Commissioner of Natural Resources had regulatory jurisdiction over Five Lake, since the water is public water of the State of Minnesota. The Administrative Law Judge certified his Decision to the Commissioner. By Order dated October 30, 1986, the Commissioner of Natural Resources affirmed the Decision of the Administrative Law Judge and found that, as a matter of law, Five Lake, Otter Tail County, is public water as that term is defined in Minn. Stat. 105.37, subd. 14 (1984). Subsequent to the Decision of the Commissioner, counsel agreed that no evidentiary hearing in the above-captioned matter was necessary and all facts for purposes of final disposition could be treated as stated in the Administrative Law Judge's Order on Motion for Summary Disposition and Order of Certification, dated October 9, 1986, attached hereto as Exhibit A. Hence, with the concurrence of all counsel, no contested case hearing in the above-captioned matter was held.

Appearances: A.W. Clapp III, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Department of Natural Resources (Department or DNR); and Richard C. Hefte, Rufer & Hefte, Attorneys at Law, 110 North Mill Street, P.O. Box 866, Fergus Falls, Minnesota 56537-0866, appeared on behalf of David H. Kaldahl (Mr. Kaldahl or Respondent).

The record herein closed on May 6, 1987, the date of receipt by the Administrative Law Judge of the final comment of counsel regarding the lack of

necessity for a hearing herein.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Natural Resources shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner.

Exceptions to this Report, if any, shall be filed with Joseph N. Alexander, Commissioner, Department of Natural Resources, First Floor DNR Building, 500 Lafayette Road, St. Paul, Minnesota 55146.

STATEMENT OF ISSUE

This proceeding was brought to determine whether the admitted, unapproved excavation of a channel and the removal of fill below the ordinary high water mark in Five Lake, Otter Tail County, are subject to the regulatory jurisdiction of the Commissioner of Natural Resources and, if so, whether Respondent must restore the area to its pre-excavation status.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Administrative Law Judge hereby adopts as Findings of Fact, Findings I through 15 of the Findings contained in the Order on Motion for Summary Disposition and Order of Certification, attached hereto as Exhibit A.

2. The Respondent has waived his right to a contested case hearing herein and has no intention to apply for a permit to authorize, after the fact, the complained of activity in Five Lake.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge hereby adopts as Conclusions herein, Conclusions 1 through 5 contained in the Order on Motion for Summary Disposition and Order of Certification, attached hereto as Exhibit A.

2. As a consequence of Conclusion 1, supra, construction in or alteration to Five Lake, Otter Tail County, requires a prior permit from the Commissioner, issued pursuant to Minn. Stat. 105.42 (1984).

3. As a consequence of Conclusions 1-2, supra, David Kaldahl has violated Minn. Stat. 105.42 (1984), by performing prohibited construction in public waters of the State of Minnesota, as that term is defined in Minn. Stat. 105.37, subd. 14 (1984).

4. Any Finding of Fact more properly considered a Conclusion, or any Conclusion more properly considered a Finding of Fact is hereby expressly adopted as such.

Based upon the foregoing Conclusions, the Administrative Law Judge recommends to the Commissioner of Natural Resources that he enter the following:

ORDER

Within 30 days of the effective date of this Order, David H. Kaldahl shall
comply with the Restoration Order herein, issued pursuant to Minn. Stat.
105.46 (1984), requiring him to fill the channel created through the

peninsula in Five Lake (56-357-P), in Otter Tail County, and to perform such other acts with respect thereto as are required in the Restoration Order.

Dated this 20th day of May, 1987.

BRUCE D. CAMPBELL
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: No Hearing Held.

MEMORANDUM

This proceeding does not involve any disputed issues of fact. Mr. David Kaldahl stipulated that he excavated a channel and removed fill below the ordinary high water mark in Five Lake, Otter Tail County, without a permit from the Department of Natural Resources. Mr. Kaldahl did so on the basis of his position that Five Lake does not constitute public waters of the State of Minnesota, and, therefore, was not subject to the regulatory jurisdiction of the Commissioner of Natural Resources. In his Order on Motion for Summary Disposition and Order of Certification dated October 9, 1986, the Administrative Law Judge determined that Five Lake is public waters of the State of Minnesota, as that term is defined in Minn. Stat. 105.37, subd. 14 (1984), and, therefore, that it is subject to the regulatory jurisdiction of the Commissioner. The determination of the Administrative Law Judge was upheld by the Commissioner, in an Order dated October 30, 1986. The Administrative Law Judge also determined in his Order on Motion, attached hereto as Exhibit A, that principles of stare decisis, res judicata and collateral estoppel did not prohibit the application of the Restoration Order to Mr. Kaldahl. The Administrative Law Judge hereby adopts, as his discussion of the legal issues involved, the Memorandum included in the Order on Motion for Summary Disposition and Order of Certification, attached hereto as Exhibit A.

Since both the Administrative Law Judge and the Commissioner have determined that Five Lake is public water of the State of Minnesota subject to the regulatory jurisdiction of the Commissioner, the channeling and removal of fill below the ordinary high water mark in the lake would require a permit

from the Commissioner. Mr. Kaldahl has waived his right to a hearing herein and has indicated an intention not to seek any permit from the Commissioner for the alteration of Five Lake previously described. Since it has been determined that Five Lake is public water of the State of Minnesota, subject to the jurisdiction of the Commissioner, and Mr. Kaldahl admits the acts herein complained of, enforcement of the previously issued Restoration Order is appropriate.

B.D.C.